NO. 21,060

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WING WA LEE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

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INDEX

AUTHORITIES CITED

AUTHORITIES CITED, Continued

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RESPONDENT'S BRIEF

JURISDICTION

The petitioner is a native and citizen of the Republic of China, about 38 years of age. He last entered the United States at Los Angeles, California, on or about September 30, 1962 as a nonimmigrant crewman authorized to remain in the United States in such status for the period of time his vessel remained in port, in no event to exceed 29 days. He failed to depart with his ship, and remained in the United States beyond

the period authorized. Deportation proceedings were instituted against him on April 5, 1963. Deportability on the charge states was conceded, and he was found deportable under Section 241 (a)(2) of the Immigration and Nationality Act, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, he remained in the United States for a longer period of time than permitted. He was ordered deported to the Republic of China (in Formosa) or in the alternative to Macao.

No appeal was taken, and the order became final. Respondent was unable to effect deportation to either place, and therefore moved to reopen the proceedings for an order for his deportation to Hong Kong. The motion was granted, and on May 19, 1965, the Special Inquiry Officer ordered deportation of petitioner to Hong Kong. An appeal to the Board of Immigration Appeals was dismissed on July 29, 1965.

On October 3, 1965, Congress amended the Immigration and Nationality Act by Public Law 89-236, particularly Section 203(a)(7) (8 USC 1153(a)(7)). Petitioner attempted to file an application under Section 203(a)(7), and moved the Board of Immigration Appeals to reopen the proceeding. The motion was denied by the Board of Immigration Appeals on the ground that petitioner was ineligible.

Petitioner invokes the jurisdiction of this Court under Section 106(a) of the Immigration and Nationality Act (8 USC 1105(a)). He does not contest the original deportation order, but challenges only the denial of his motion to reopen the deportation proceedings.

Respondent concedes jurisdiction under Section 106(a). Although the petition for review was filed more than six months after the original deportation order, it was timely with respect to the Order of the Board of Immigration Appeals of June 1, 1966.

Bregman v. INS, 9 Cir.
351 F.2d 401

The attention of the Court is called to the case of Tai Mui v. Esperdy in the Court of Appeals for the Second Circuit (Docket No. 30621, Calendar No. 133). On an identical factual situation the case reached the Court of Appeals via a summary judgment in a declaratory judgment action in the District Court. The appellant had sought and was denied a stay of deportation from the District Director, in order to prosecute an application for adjustment of status under Section 203(a)(7) of the ground that as a crewman he was ineligible.

Several other cases of aliens seeking the same relief are pending in the Second Circuit, on petitions to review under Section 106(a).[1/]

1/ Woo Cheng Hwa v. INS, Docket 30522, Calendar 154
Young Huk Ju v. INS, Docket 30626) awaiting
Cheung Hong Sing v. INS, Docket 30637) decision
Ah Tseng Yu v. INS, Docket 30697) in
Kwong Chau v. INS, Docket 30719) Woo Cheng Hwa

STATUTES

Immigration and Nationality Act, as amended
Section 106, 8 USC (1964 Ed.) 1105(a)):

(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended * * *, shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against liens within the United States pursuant to administrative proceedings under section 242(b) of this Act * * * except that--

(1) A petition for review may be filed not later than six months from the date of the final order of deportation * * *;

(9) Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

Section 203(a), 8 USC (1964 Ed. Supp. I) (1153(a)):

(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (a) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals

of the countries or areas in which their application for conditional entry is made; or (3) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Section 245, 8 USC (1964 Ed.) §1255:

(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved. * * *

REGULATIONS

Title 8 Code of Federal Regulations (Rev. January 1, 1966):

§245.1 Eligibility

(a) General. An alien who on arrival in the United States was serving in any capacity on board a vessel or aircraft, or was destined to join a vessel or aircraft in the United States to serve in any capacity thereon, or was not admitted or paroled following inspection by an immigration officer is not eligible for the benefits of section 245 of the Act.

(d) Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203 (a)(7).

* * * An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act and as provided in §245.4, unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. (31 F.R. 535, January 30, 1966.)

§245.4 Adjustment of status under the proviso to section 203(a)(7) of the Act.

The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of

the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination. * (31 F.R. 536, January 15, 1966.)

QUESTION PRESENTED

Is petitioner eligible for relief under Section 203(a)(7) of the Act?

ARGUMENT

Respondent presents the same argument to this Court as has been presented to the Second Circuit in the mentioned cases, particularly Tai Mui v. Esperdy and Woo Cheng Wa v. INS.

The Board of Immigration Appeals properly denied petitioner's motion to afford him an opportunity to apply for adjustment of status under Section 203(a)(7) of the Immigration and Nationality Act for which petitioner was statutorily ineligible.

This subsection was amended to add the last two sentences. 31 F.R. 536, January 15, 1966.

Petitioner contends that Section 245 of the Act does not apply to him, and that Section 203(a)(7) contains no bar against crewmen. He contends that 8 CFR 245.1 and 245.4, the regulations which exclude crewmen, are an unauthorized limitation on the operation of Section 203(a)(7).

The motion to reopen was denied on the ground that an alien who enters as a crewman is not eligible for adjustment of status under Section 203(a)(7).

Section 203 provides for the allocation of 170,000 immigrant visas each fiscal year, 1/ among seven preference classes. Aliens who have close relatives in the United States qualify for 74% of the visas under the first, second, fourth, and fifth preferences. Members of the professions come within the third preference, which is allocated 10% of the visas. Another 10% is allocated under

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1/ Section 201(a), 8 USC (1964 Ed., Supp. I, Section 1151(a).

the sixth preference to aliens capable of performing skilled or unskilled labor for which there is a shortage of qualified workers in the United States. These preferences, which were revised by the Act of October 3, 1965, 79 Stat. 911, represent a continuation of a system of preferences which had been in effect under prior law, although the first six preferences in their present form are broader in scope than their predecessors. 2/

The remaining 6% of the available numbers is allocated to the seventh preference, which is described in Section 203 (a)(7). This subsection provides for the issuance of "conditional entries" to aliens who may be broadly classified as refugees,

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2/ Section 6 of the Act of May 26, 1924, 43 Stat. 155, provided preferences based on relationship of the immigrant to citizens or alien residents.

Section 203 of the Act, as originally enacted, Act of June 27, 1952, 66 Stat. 178, allocated the visas on the basis of skills, (firstpreference, 50%) and relationship" (second preference, 30%, third preference, 20%). Visas unused by the first three preferences became available for non-preference immigrants, with 25% reserved for a fourth preference on the basis of relationship. The Act of September 22, 1959, 71 Stat. 639 changed the composition of the second, third and fourth preference classes slightly.

from a communist or communist-dominated country, or from a designated area in the Middle East, who because of fear of persecution are unwilling or unable to return to the country from whence they came and who are not nationals of the country or area in which they make their application. This part of Section 203(a)(7) is a "codification of a previous practice under which aliens, usually refugees, were 'paroled' into the United States under various emergency legislative or executive provisions." In including this new provision as a permanent part of the Immigration Act, Congress continued an immigration policy which has existed since the close of World War II, whereby the United States has participated in the worldwide resettlement of refugees. See Senate Report 748, 89th Cong., 1st Sess., p. 16; House Report 745, 89th Cong., 1st Sess., p. 15. As the Committee Reports

indicate, Congress adopted the term "conditional entry" in order to avoid the unfavorable connotation of the term parole, which had been used under the Fair Share Refugee Act, Act of July 14, 1960, 74th Stat. 504. As further indicated in the reports, it was contemplated that the "conditional entry" procedure, in force under the prior temporary legislation, would be virtually the same under the new law. Thus, Section 203(g) and (h), 8 USC (1964 Ed. Supp. I) Sections 1153(g) and (h), are a codification of the procedure in effect under the Fair Share Refugee Act.

Section 203(a)(7), in addition to providing for the issuance of "conditional entries', includes the proviso that:

> "immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status." [Emphasis supplied.]

The proviso thus provides for the issuance of "immigrant visas" to be used for "adjustment of status". The interrelation of the proviso and adjustment of status under Section 245 becomes apparent on examination of the terms of art employed in both Sections as well as the legislative history.

As Judge Levet points out in his decision: 3/

> "The inclusion of the words 'adjustment of status' & * * [in Section 203(a)(7)] does no more than refer to the process of application; the presence of those words does not create any new substantive rights. Adjustment of status must still be carried out under Section 245. If there is any doubt that that was Congress' intention, one need only look at Senate Report 748, 89th Cong., 1st. Sess. 12 (1965) where it is said with regard to Section 203(a)(7) of the Act:
>
> > ' * * * It is contemplated that such adjustment will be made under Section 245 of the Immigration and Nationality Act.'"

3/ Unreported decision in the United States District Court, S. D. New York, in Tai Mui v. Esperdy, 66 Civ. 316.

While the statement of the congressional intention is quite specific and serves to demonstrate that the term of art, "adjustment of status" under the provisions of Section 245, there are other cogent reasons for so construing the section in this manner. As already shown Section 203(a)(7) first sets aside numbers which shall be made available for conditional entries. The subsection then provides that in lieu of "conditional entries", "immigrant visas" may be made available in a number not exceeding one-half of the total, for the adjustment of status of aliens who have been physically present in the United States for at least two years.

Section 245(a)(3) provides that one of the indispensable requisites for adjustment of status is that "an immigrant visa is immediately available to * * * [the alien] at the time his application is approved." Section 245 of the Act is the only section which requires that an alien have an immigrant visa immediately available in order to adjust status.

The other provisions of the Act, Sections 244 and 249, 8 USC Sections 1254 and 1259, which provide for adjustment of status by aliens in the United States, do not require that an immigrant visa be immediately available. Thus, even in the absence of the express declaration in the Senate Report concerning the applicability of Section 245, the procedures provided within the Act indicate that adjustment is governed by Section 245, since only that section has the immigrant visa requirement.

Recapitulating then, we find Congress enacted a permanent provision concerning refugees. For refugees outside the country, Congress provided conditional entries together with procedural provisions which had not previously been an integral part of the Act. For refugees who have been in the United States for more than two years, Congress allocated immigrant visas for adjustment of status. No new procedural provisions were needed since Section 245 was already a part of the basic Act.

We come then to appellant's contention that since Section 203(a)(7) does not, by its specific terms, bar a crewman, he should not be barred by the limitations imposed under Section 245. The Attorney General has provided in 8 CFR 245.4 that an alien seeking to adjust status as a refugee, must do so in accordance with the provisions of Section 245. Accordingly, the Board of Immigration Appeals concluded that a crewman may not adjust his status, even assuming he could otherwise qualify as a refugee, since crewmen are specifically barred from adjustment under Section 245. Similarly, an alien who entered the United States without inspection would be barred, since such an alien does not meet the requirements of Section 245.

The Court will note that Congress amended Section 244 of the Immigration and Nationality Act by Section 12(b) of the Act of October 3, 1965, which reopened the benefits

of that provision to crewmen who entered the United States prior to July 1, 1964. While this amendment indicates some disposition on the part of Congress to moderate a policy which had theretofore barred crewmen from any adjustment of status, it is significant that the absolute bar of Section 245 was retained.

The restrictive policy toward crewmen had initially been reflected in Section 10 of the Act of July 14, 1960, 74 Stat. 504, which excluded crewmen from adjustment under Section 245. See Fassilis v. Esperdy, 301 F.2d 429 (2d Cir. 1962). Still later, this congressional policy was extended to suspension under Section 244 by Section 4 of the Act of October 24, 1962. See Foti v. INS, 332 F.2d 424 (2d Cir. 1964).

Moreover, and again significantly, in the course of the legislative process which ultimately resulted in the 1965 Act, Congressman Feighan, the Chairman of the House Committee,

had introduced his own bill, H.R. 8662, which would have removed the crewmen exclusion from Section 245. This proposal was rejected and did not appear in the bill, as finally enacted. In an address this June to the annual convention of the Association of Immigration and Nationality Lawyers, Congressman Feighan stated:

> "Other provisions of my bill which were subsequently modified were the advancement of the registry date to December 24, 1952 (the final bill cut it back to 1948); the eligibility for suspension of deportation of any alien regardless of the manner of his entry or the place from which he came (the final bill continued ineligibility for exchange aliens and natives of contiguous territory and adjacent islands); and the eligibility for Section 245 adjustment for those who entered as crewmen (the final bill barred crewmen, including potential 203(a)(7) refugees, from that privilege)." [Emphasis added.]*

Against this background, the conclusion is inevitable that Congress, aware of the restrictions of Section 245, nevertheless limited the scope ofthe proviso to Section 203(a)(7) by withholding adjustment from crewmen, and those who enter without inspection.

* The speech appears at 112 Cong. Rec. 13958, 13959 (daily ed. June 29, 1966).

It is not enough that an alien be a refugee. In order to adjust his status he must meet all of the qualitative and quantitative standards, in addition to those of the refugee. Those standards include the mode of admission under Section 245.

CONCLUSION

The decision of the Board of Immigration Appeals should be affirmed.

Respectfully submitted,

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United States Attorney

By: _____
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent.

Dated:
December 21, 1966.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES LEMER-COLLETT
Chief Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

ED STATES COURT OF APPEALS
THE NINTH CIRCUIT

No. 21,060

The undersigned hereby certifies that he is mployee in the Office of the United States Attorney the Northern District of California, and is a person uch age and discretion as to be competent to serve rs.

That on December 21, 1966 he served a copy the attached RESPONDENT'S BRIEF by placing said copy a penalty envelope addressed to the person hereinafter ed, at the place and address stated below, which is last known address, and by depositing said envelope contents in the United States mail at 450 Golden Avenue, San Francisco, California.

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